

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DAVID McARTHUR,

Plaintiff,

-against-

3:06-CV-860
(LEK/DRH)

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

DECISION AND ORDER

This matter comes before the Court following a Report-Recommendation filed on October 15, 2008, by the Honorable David R. Homer, United States Magistrate Judge, pursuant to 28 U.S.C. § 636(b) and L.R. 72.3(c) of the Northern District of New York. Report-Rec. (Dkt. No. 13).

Within ten days, excluding weekends and holidays, after a party has been served with a copy of a Magistrate Judge's Report-Recommendation, the party "may serve and file specific, written objections to the proposed findings and recommendations," FED. R. CIV. P. 72(b), in compliance with L.R. 72.1. No objections have been raised in the allotted time with respect to Judge Homer's Report-Recommendation. Furthermore, after examining the record, the Court has determined that the Report-Recommendation is not subject to attack for plain error or manifest injustice.

Also before the Court is a Letter Motion filed by Daniel McArthur on November 6, 2008 seeking attorneys fees. Dkt. No. 14. That order, however, was premature, since the Report-Recommendation was not a final order remanding the case for a new hearing pursuant to sentence four of 42 U.S.C. § 405(g). Since Plaintiff had not yet received a judgment in his favor, he was not

a prevailing party within the meaning of the Equal Access to Justice Act, 28 U.S.C. § 2412(d) at the time he filed the Motion. Since the Court is now reversing the decision denying benefits, the Commissioner is granted an extension of 30 days from the date judgment is entered in the case to respond to McArthur's Motion.

Accordingly, it is hereby

ORDERED, that the Report-Recommendation (Dkt. No. 13) is **APPROVED** and **ADOPTED** in its **ENTIRETY**; and it is further

ORDERED, that the decision denying benefits is **REVERSED**; and it is further

ORDERED, that McArthur's Motion for a finding of disability (Dkt. No. 10) is **GRANTED**; and it is further

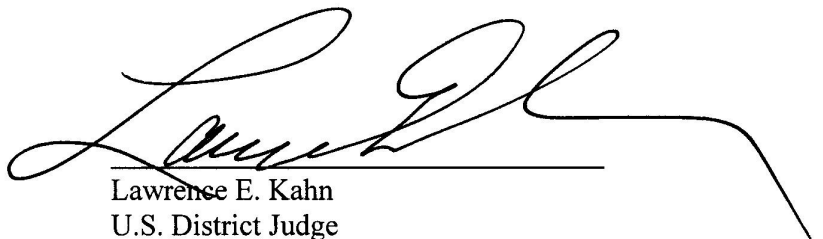
ORDERED, that the Commissioner's cross-Motion (Dkt. No. 11) is **DENIED**; and it is further

ORDERED, that the Commissioner shall have **30 days** from the entry of judgment to respond to McArthur's Letter Motion for attorneys' fees (Dkt. No. 14); and it is further

ORDERED, that the Clerk serve a copy of this Order on all parties.

IT IS SO ORDERED.

DATED: November 07, 2008
Albany, New York



Lawrence E. Kahn
U.S. District Judge